THE *RENVOI* DOCTRINE IN THE CONFLICT OF LAWS—MEANING OF "THE LAW OF A COUNTRY"

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I

Some years ago in writing on the present subject the author made the statement that the *renvoi* doctrine was no part of the conflict of laws of the United States.[1] In the light of certain more recent decisions or judicial utterances the question may properly be asked again: Should the courts of the United States adopt the *renvoi* theory in the conflict of laws? Although no discussion of the problem is yet to be found in any American decision, there are cases in which the *renvoi* doctrine has been sanctioned either expressly or by necessary implication. The case of *Guernsey v. The Imperial Bank of Canada*[2] and the case of *Lando v. Lando*[3] may serve as illustrations. In the former case an action was brought in the Circuit Court of the United States for the District of Wyoming against the indorser of a promissory note. The note was made and indorsed in Illinois, but it was payable in Canada. Presentment, demand and protest were made, and notice of dishonor was given in compliance with the law of Canada; but the indorser claimed that the notice would have been insufficient to charge the indorser if the note had been payable in Illinois. The court below held that the notice was good and rendered judgment against the indorser. The latter's counsel insisted that the ruling was error on the ground that the sufficiency of the notice was governed by the law of the place of indorsement and not by the law of the place of payment. On appeal, the learned court made the following remarks concerning the above contention:

"To this contention there is a short and conclusive answer. The place of the indorsement was the state of Illinois. The law of that state was, when the indorsement was made, and it still is, that when commercial paper is indorsed in one jurisdiction and is payable in

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[1] *The Renvoi Theory and the Application of Foreign Law* (1910) 10 COLUMBIA L. REV. 327, 344.

The *Annuaire de l'Institut de droit international* will be cited in this article as ANNUAIRE; the *Journal du droit international privé,* as CLUNET; the *Revue de droit international privé et droit pénal international,* as DARRAS; the *Zeitschrift für internationales Privat- und Strafrecht,* as NIEMEYER.

[2] (1911, C. C. A. 8 C.) 188 Fed. 300.

[3] (1910) 112 Minn. 257, 127 N. W. 1125.

another the law of the place where it is payable governs the time and mode of presentment for payment, the manner of protest, and the time and manner of giving notice of dishonor, and the law of the place of indorsement is inapplicable to them. Wooley v. Lyon, 117 Ill. 248, 250, 6 N. E. 885, 886, 57 Am. Rep. 867. *If, therefore, as counsel contend, the law of the place where the indorsement was made, the law of Illinois, governs the sufficiency of the notice of dishonor in this case, that notice was good, for it was sufficient under the law of Canada where the note was payable, and the law of Illinois was that in a case of this character the law of the place where the note was payable governed the time and manner of giving the notice of dishonor."*[4]

The statement quoted assumes that if the law of the place of indorsement (Illinois) must be satisfied in the matter of notice, and the law of the place of indorsement requires the notice to comply with the law of the place of payment (Canada), a notice sufficient under the law of Canada would be good. The reference to "the law of the state of Illinois" is understood thus, not as covering merely the ordinary law of Illinois governing notice, but as incorporating the law of Illinois as a whole, inclusive of its rules of the conflict of laws.

The decision in the case of *Lando v. Lando*[5] rests upon the same assumption. The facts of the case were the following: Ida Oberg and David H. Lando, residents of Minnesota, were married at Hamburg, Germany, by a person who was not authorized by the law of Germany to join persons in marriage, but whom Ida Oberg believed in good faith to be a minister of the Gospel. The parties in question afterwards lived as husband and wife in Vienna, where they held themselves out as husband and wife, and where they were generally so regarded by their friends and acquaintances. David H. Lando died before returning to this country. Ida Lando claimed to be entitled to appointment as administratrix of his estate and thus put in issue the validity of their marriage. The supreme court of Minnesota was in doubt as to the meaning of the German rules of the conflict of laws governing the validity of marriage; but, applying the rule of interpretation *semper praesumitur pro matrimonia,* it reached the conclusion that the marriage would be sustained in Germany by virtue of the national law of the parties, that is, the law of Minnesota.

So far as the reasoning of the court bears upon the question of the conflict of laws, Justice Jaggard contented himself with the following statement:

"1. The validity of the marriage is to be determined by the law of Germany, where it was celebrated. It is a generally accepted principle of interstate and international law that the validity or invalidity of a marriage is to be determined by the law of the place where the ceremony is performed; that a marriage legal where solemnized is valid everywhere; and that a marriage void where it is celebrated is void

[4] (1911) 188 Fed. 300, 301. The italics are those of the present writer.
[5] (1910) 112 Minn. 257, 127 N. W. 1125.

everywhere. If the law of the place of trial were to control, a marriage might be valid in one state and invalid in another. It is obviously essential to the welfare of mankind that a marriage valid in one place should be valid everywhere. . . .

"This rule applies to cases where the parties attempting to marry are mere sojourners in the place where the marriage ceremony is claimed to have been performed. . . .

"2. The decisive question in the case is whether the parties were married in accordance with the German law. The court does not take judicial cognizance of the law on this point. It is elementary that foreign laws must be pleaded and proved like any other fact. . . ."

The court thereupon discusses the German law as it was stipulated by the parties and concludes its opinion with the following:

"We are unable to perceive why the presumption of validity of an attempted marriage should be denied to these parties, both innocent of moral wrong, and the presumption of innocence extended to the most confirmed recidivist. Certainly the considerations relied upon to repel that presumption are not clear nor satisfactory, nor at all conclusive. We are therefore constrained to hold that the marriage in question, conforming as it did to the Minnesota law, conformed also to the German law as its translation has been here agreed upon."

Not a word is said in the opinion about the fact that the term "German law" may mean either the ordinary German law of marriage, or the German law inclusive of its rules of the conflict of laws. The learned court assumes that the Minnesota law incorporates the German law as a whole.

II

The question raised by the above cases is one which has been greatly mooted among the writers on the conflict of laws. It is known as the problem of *renvoi*.[6]

The recognition of the *renvoi* theory implies that the rules of the conflict of laws are to be understood as incorporating not only the ordinary or internal law of the foreign state or country, but its rules of the conflict of laws as well. According to this theory "the law of a country" means the whole of its law.

Let us consider briefly the modes of reasoning which have led certain courts and text-writers to support this doctrine. The purpose of this article will be served best if the *renvoi* theory be presented only in the two principal forms in which it has appeared. One is the theory which we shall call, for convenience, the "theory of *renvoi*

[6] The literature may be found in an appendix to this article.

In a recent work by Emil Potu, *La question du renvoi en droit international privé* (Paris, 1913), a complete list is given of all the authors who have expressed themselves on the question of *renvoi*, with an indication of their attitude in the matter. A similar attempt was made some years ago by the author of this article: see 10 COLUMBIA L. REV. 190, 194, 196.

proper." The other is known as the "mutual disclaimer of jurisdiction theory." As the latter theory has the weighty support of Westlake, it will be considered first.

MUTUAL DISCLAIMER OF JURISDICTION THEORY

According to von Bar, who was the first to favor *renvoi* in this form, all rules of the conflict of laws are in reality rules by which one state, for the purpose of administering private law, defines its own jurisdiction and the jurisdiction of foreign states. Starting from this premise he reasoned as follows:

"Due respect for the sovereignty of the state of X should forbid the state of Y to ascribe to the state of X a jurisdiction which the state of X declines. Inasmuch as Italy applies the principle of nationality to the determination of capacity, England has no right to say that the capacity of an Englishman domiciled in Italy should be determined by the internal law of Italy relating to capacity. Italy having declined jurisdiction in the case, England must accept the reference back to its own law and determine the capacity of the Englishman in question by English law. If the *renvoi* is not accepted and the question is decided according to the internal law of Italy, Italian law is applied to cases for which it is not enacted. In so doing England would usurp the function of the Italian legislator, filling an assumed gap in the Italian law, directly contrary to the will of the Italian legislator."[7]

Von Bar presented his views at the meeting of the Institute of International Law, at Neuchatel, in 1900, in the form of the following theses:[8]

"(1) Every court shall observe the law of its country as regards the application of foreign laws.

(2) Provided that no express provision to the contrary exists, the court shall respect:

(*a*) The provision of a foreign law which disclaims the right to bind its nationals abroad as regards their personal statute, and desires that said personal statute shall be determined by the law of the domicile, or even by the law of the place where the act in question occurred.

(*b*) The decision of two or more foreign systems of law, provided it be certain that one of them is necessarily competent, which agree in attributing the determination of a question to the same system of law."

Westlake originally rejected the *renvoi* doctrine except in special cases.[9] He changed his view, however, before long and accepted the *renvoi* theory fully. The reasoning which led Westlake to this change of attitude is similar to the one employed by von Bar, but it is developed in a clearer and more logical manner. It was first

[7] See von Bar, 8 NIEMEYER, 177-188. Also in 2 Holtzendorff, *Encyclopädie der Rechtswissenschaft* (6th ed. by Kohler) 19.

[8] 18 ANNUAIRE, 41.

[9] 17 ANNUAIRE, 31, 34.

expressed by Westlake in a note addressed to the Institute of International Law.[10] *In substance* it is as follows:

"A distinction between internal law and international law belongs only to the science of law but does not actually exist. Suppose a legislator says (*a*) that the capacity to make a will shall be acquired at the age of 19; (*b*) that the capacity of persons shall be governed by their national law. Rule (*a*) would have no meaning without rule (*b*). Whose testamentary capacity is acquired at 19? No answer can be given without the aid of rule (*b*) fixing the category of persons whose capacity the legislator believes he has a right to fix. According to (*b*), (*a*) says that the capacity of the legislator's subjects is acquired at 19, but says nothing regarding the capacity of foreigners domiciled within the territory. If rule (*b*) had said that capacity shall be governed by the law of domicile, (*a*) would have enacted that the capacity of persons domiciled within the territory of the legislator is acquired at 19, but would have said nothing regarding the capacity of his own subjects domiciled abroad.

"In whatever terms rule (*b*) may be expressed, its true sense will be limited to the cases which, according to the ideas of the legislator, fall within his authority. There are normal cases which the legislator deems to belong to him and with regard to which he intends to legislate. The Danish legislator, for example, who attaches a decisive importance to domicile, will regard as the normal case in the matter under discussion a person domiciled in Denmark for whom he fixes the age at 21. To the Italian legislator, on the other hand, who attaches a decisive importance to nationality, the normal case will be that of an Italian subject; and for him he fixes the age at 19.

"A legislator who regards a certain case as normal will regard analogous cases as being normal for other legislators and as belonging to them. A Danish legislator will direct his judges, therefore, to recognize persons domiciled in a foreign country as capable or incapable of making a will in accordance with the law of their domicile, and the Italian legislator will regard foreigners as having such capacity to make a will as may have been conferred upon them by their national legislator.

"By means of this second step the Danish legislator provides for persons domiciled in a country whose legislation in the matter is also based on the *lex domicilii*. But it does not provide a rule for persons domiciled in a country such as Italy, whose legislation is silent as to the capacity of persons domiciled in such jurisdiction.

"In the same way the Italian legislator provides by this second step for the subjects of a country the legislation of which, like that of France, is based likewise on the principle of nationality, but it lays down no rule for the subjects of a state the legislation of which, like that of Denmark, makes no provision for its own subjects.

"A third step is necessary in these cases, namely, to direct the judge to apply in the absence of another law, the normal law. The Dane domiciled in Italy will be deemed in Denmark, therefore, to have reached the age of testamentary capacity only at 21; but in Italy he will be deemed to have reached it at the age of 19.

"The case known in Germany by the name of *Weiterverweisung* remains to be considered, that is, where the law incorporated by

[10] 18 *Ibid.* 35-40.

reference would have the law of a third state applied. Suppose two citizens of New York (capacity to contract being governed there by the *lex loci*) enter into a contract in Italy, being at that time domiciled in France, and that litigation with respect thereto arises in England. The *lex fori* (England), applying the law of the domicile at the time of the making of the contract to determine the capacity of the parties to enter it, will refer the matter to France. France having adopted the principle of nationality with respect to capacity will answer: 'The case does not belong to me; it belongs to the New York legislator.' Should the English judge, following the direction of the French law, ask the New York law, it would tell him that, in its opinion the case did not belong to New York, but (under the rule *lex loci*) to the Italian legislator.

"But rule (*b*) does not require the English judge to follow the direction given by France to consult New York law. Instead, he should apply the normal law of his own country, rule (*a*). The judge must determine in the first instance to which country the legal relationship presented to him belongs; if the law of the latter, based upon another system regarding the conflict of laws, says that the case does not belong to it, there is no further reference to the law of a third state."

Westlake discusses the problem also in his treatise on *Private International Law,* Chapter II,[11] where he states the problem in a somewhat different form:

"The matter is so cardinal in relation to the real meaning of private international law that, at the risk of being tedious, I will put it again in different language, but with a difference only of language. The English or Danish judge cannot hold the lad of nineteen to have attained his age unless he is prepared to answer the question, what lawgiver made him of age? That is independent of all views about the conflict of laws, for it results from the nature of law itself. Now the Italian code does indeed seem to lay down a rule about the status and capacity of all persons without exception, but this is only a misleading generality, for no one can doubt that the principle of nationality adopted in Italy prevents the Italian lawgiver from claiming authority over the capacity of a British or Danish subject. The English or Danish judge therefore cannot say that the Italian lawgiver made the *de cujus* of age at nineteen: Then, it will be asked, who is the lawgiver that keeps him a minor till he has attained twenty-one? And the answer is, the British or Danish lawgiver; for no one can doubt his authority over the capacity of his subjects if he chooses to exercise it, and the Italian lawgiver's disclaimer removes the objection which he would have felt to exercising it in the case of one of his subjects who was not domiciled in the British dominions or in Denmark. The result will coincide with that given by the *renvoi,* properly limited so as to avoid an endless series of references to and fro, but its real base lies, not in the doctrine of *renvoi,* but in the duty of considering the essential nature of the legal relation in question in any concrete case, and the essential meaning of the rules of private international law adopted in the different countries concerned."

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[11] (5th ed.) 33.

The mutual disclaimer of jurisdiction theory of von Bar and Westlake, contrary to the theory of *renvoi* proper, necessarily leads to the application of the internal law of the forum in practically all cases in which the rules of the conflict of laws of the forum differ from those of the country whose law has *prima facie* been adopted and incorporated. Whenever there is a diversity in the rules of the conflict of laws of the two countries concerned, it means, according to this theory, that there is no internal rule in either country actually applicable to the case. In reality, there is a gap in the law which the judge of the forum, who is obliged to decide the case in some manner, is forced to fill up by applying his own internal law. As Westlake points out, there can be no question under this theory of a forward reference or *Weiterverweisung*. The judge is not to regard himself as sitting in the foreign country, as he is required to do under the theory of *renvoi* proper in its wider form; nor is he to follow the directions of the foreign law. All he is asked to do by the law of the forum is to ascertain whether the law of the foreign country which is incorporated claims jurisdiction over the case. If it does not, its law has nothing further to say in the matter; the law of the forum directs its judge in such event to apply its own internal law.

Von Bar would restrict his *renvoi* theory, as appears from his thesis No. 2 (*a*) quoted above,[12] to the cases where the personal statute is involved, that is, where the law of nationality comes into collision with the law of domicile or with the law of the place where the act in question occurred. Westlake, on the other hand, would apply the above reasoning to all cases in which divergent rules of the conflict of laws of the countries in question amount to a mutual disclaimer of jurisdiction. Such a disclaimer would follow in all cases where the rules of the conflict of laws differ, unless such difference arises from the fact that a foreign law leaves it optional with the parties whether they will be governed by such foreign law or by that of another state, such option not being allowed by the law of the forum. Let us assume, for example, that a question arises in the state of X in respect to the validity of a conveyance of land in the state of Y; the deed being executed in the state of Z in the form prescribed by the law of Z, but not in the form required by the local law of the state of Y. Let us assume also that the law of the state of Y authorizes the execution of deeds either in the form customary in the place of execution, or in that prescribed by the law of the *situs*. Should the courts of the state of X recognize the validity of the deed? Westlake's reasoning would not include this case, for the law of the state of Y as the law of the *situs*, which the law of the state of X has incorporated, does not disclaim jurisdiction. All it has done is to facilitate

[12] *Supra*, p. 512.

the formal execution of deeds relating to land within its territory by giving an option or choice.

One of the *rapporteurs* on the question of *renvoi* before the Institute of International Law, Professor Buzzati,[13] raised the following objections to *renvoi* in the form suggested by von Bar and Westlake:

(1) The starting point, namely, that a legislator adopting the law of domicile to determine capacity is not interested in his subjects abroad and does not legislate with reference to them, and that a legislator adopting the law of nationality in his system of the conflict of laws is not interested in foreigners domiciled within his territory and does not legislate with respect to them, rests upon an erroneous assumption. It is absurd to say that the provisions of the Italian Civil Code do not apply to an Englishman who is domiciled in Italy.

(2) Neither von Bar nor Westlake denies the competency of a state to extend its jurisdiction over a matter which another state claims for itself. And yet, their theory rests upon the fundamental proposition that due respect for the state of X makes it improper for the state of Y to assign to the state of X a jurisdiction which the state of X declines. Just as if it were not a greater offense to deprive the state of X of a jurisdiction which it claims than it would be to assign to it a jurisdiction which it does not claim.

(3) The fundamental error of the theory consists in the assumption that it is possible for the state of Y to bring its own jurisdiction into perfect accord with that of other states so that there will be no infringement upon their jurisdiction. But this is impossible and will remain so as long as the states have different rules relating to the conflict of laws. Each state is, therefore, obliged to adopt its own rules without deferring to those of other states.

The first objection mentioned by Buzzati is elaborated more fully by Kahn.

"According to this writer the thought of the legislator in directing the application of foreign law is about as follows: 'Though I regard my law as the better and the more reasonable, it is generally more important to aim at international uniformity of treatment, even at the risk that objectively the result is not so good. If we should desire to apply our law exclusively in those cases also in which the legal relationship has a much more important connection with foreign countries, the advantage gained from the application of our better law would be out of proportion to the disadvantages with respect to international uncertainty of law resulting therefrom. . . . Just as I treat foreign law, so shall I also be treated in general. If I expect and demand that my law shall be taken into consideration by other countries, I must as far as possible admit the application of foreign law in analogous cases.

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[13] Buzzati, *Nochmals die Rückverweisung im internationalen Privatrecht*, 8 NIEMEYER, 449, 451-452.

"We see, therefore, that the rule of private international law, however closely it may be connected with the rule of substantive law, is, nevertheless, by no means a pure expression of the applicability of our law; that the legislator establishing a certain point of contact for his private international law is far from asserting that he has no substantive law for other cases.

"The legislator determining the right of succession according to the domicile of the deceased says merely: 'For me, domicile is a more important point of contact than nationality or any other principle. I would gladly apply my rules concerning succession also to my subjects residing abroad, to all property situated in my territory, etc. Yet I know that if I want to aim at international uniformity of law I can claim, on principle at least, but one point of contact. That being so, I prefer to assure the strict application of my rules concerning succession as to those who live in my territory. I will rather suffer an application of foreign law to my subjects abroad than to admit its application to persons domiciled within my territory.' "[14]

The writer of the present article called attention, on a former occasion, to the fact that Westlake's theory also lacks all support from an historical point of view. He there made the following observations:[15]

"Without dwelling upon the singular results that would be obtained if Westlake's theory that there is in reality no positive conflict but merely a mutual disclaimer of jurisdiction became accepted law, it is easy to show that it rests upon premises which lack all real support. His point of departure—that there is an inseparable connection between the rules of Private International Law of a given country and its internal or territorial law, so that, according to the real intention of the legislator, the former must be deemed to define the limits of the latter's application, cannot be admitted. In Roman Law, for example, there were no rules of Private International Law in the proper sense; hence it would appear that the Roman legislator enacted laws without reference to their application in space. As to the modern continental countries, notwithstanding the fact that the science of Private International Law has been known to them since the fourteenth century, their present codes, almost without exception, contain such scant provisions relating to the Conflict of Laws that an assertion that the legislator in adopting a rule of internal law in reality defined its operation in space by the corresponding rule of Private International Law is an absurdity. In most instances no such rule of Private International Law could be found in any law. And with respect to England and the United States the unsoundness of Westlake's contention is all the more apparent for the reason that the law of England was fully developed before the rules relating to the Conflict of Laws, taken over from the continent, became a part thereof. With what show of reason can it be said then that the two are one and inseparable? Laws are enacted by a legislator without any thought of their operation in space. The object of the science of Private International Law of a particular country is to fix the limits of the application of the territorial law of such country, but its

[14] 40 Jhering's *Jahrbücher für die Dogmatik*, 67-68.

[15] 10 COLUMBIA L. REV. 190, 202-204.

aim is not restricted to this. It includes also the determination of the foreign law applicable in those cases in which the *lex fori* does not control. Otherwise the courts of the forum would be left by the national legislator without a guide as to the applicatory law in that class of cases."

Nothing further need be added to show that the *renvoi* theory in the above form is untenable.

THEORY OF RENVOI PROPER

The term *renvoi* includes two notions: the notion of a "return reference," that is, *Rückverweisung,* and the notion of a "forward reference," that is, *Weiterverweisung.* Some of the writers would support the theory of *renvoi* proper only so far as it involves a return reference. The English and American courts, however, so far as they have recognized the *renvoi* doctrine, appear to have done so in its wider form, so as to include the possibility of a reference to the law of a third state.[16]

The theory of *renvoi* proper in its narrower form—*Rückverweisung* —has the following meaning:

If, for example, the English law directs its judge to distribute the personal estate of an Englishman who has died domiciled in Belgium in accordance with the law of his domicile, he must first inquire whether the law of Belgium would distribute personal property upon death in accordance with the law of domicile, and if he finds that the Belgian law would make the distribution in accordance with the law of nationality—that is, English law,—he must accept this reference back to his own law.

Bentwich appears to accept the *renvoi* theory in this form and advances the following argument in its support:

"The *renvoi* is *in principle* a reference back not to the whole law of the foreign country including its different rules of Private International Law, but simply to its internal law. Suppose a case where the *lex fori* (hereinafter called A) submits the matter to the *lex domicilii* (B), and B refers the matter back to A as the law of the nationality. A accepts the *Renvoi,* and applies its own law. If we regard first principles, we see that what has happened is this. Law is primarily sovereign over all matters occurring within the territory, and so A would ordinarily apply to the succession. A from motives of international comity and to secure a single system of succession, resigns its ordinary jurisdiction to B. But B, by reason of its special juristic conceptions, does not take advantage of the sacrifice or accept jurisdiction. A's primary jurisdiction consequently is properly exercised, and there is no ground for A to decline to accept

[16] *In re Trufort* (1887) 36 Ch. D. 600; *Guernsey v. The Imperial Bank of Canada* (1911, C. C. A.) 188 Fed. 300.

the renunciation of B, since it thereby puts into operation its fundamental principle of regulating every matter within the territory."[17]

It will be noted that the *renvoi* theory in the above form, like Westlake's mutual waiver of jurisdiction theory, always leads to the application of the ordinary, or internal, law of the forum. The reasoning, however, upon which it is based is very different. According to Bentwich the rules of the conflict of laws of each state rest, as it were, upon the theory of an implied agreement among the states for the application of each other's law. The law of the foreign state is to be enforced only if the foreign state under the same circumstances would enforce the law of the forum. Unless reciprocity is guaranteed, the law of the forum will apply its own internal law. The question is thus raised whether the rules of the conflict of laws rest solely upon the principle of reciprocity. It is submitted that they do not. No doubt the courts of a state have come to apply foreign law partly because of their desire to assure the application of their own law by foreign courts. But this does not mean that reciprocity must exist with reference to any particular rule. Indeed, in the common law of the United States there is only a single instance where the courts insist upon reciprocity in the latter sense, namely, in the enforcement of foreign judgments by the federal courts.[18] Considerations of justice and of expediency have played a very important part in the adoption of specific rules in the conflict of laws. To take the example which Bentwich cites for an illustration, can it be said that the law of domicile was adopted by the English and American courts in the distribution of personal property upon death solely because the continental courts had adopted this rule, so that reciprocity would be guaranteed? If this were so it would follow that if, at the time of the adoption of the *lex domicilii* in England in the distribution of movable property upon death, the rule of nationality had prevailed on the continent, as it does to-day, the English courts should have accepted the latter rule. It is clear, however, that they would not have done so, because it would not have suited English conditions. In a country in which private law is not unified, the law of nationality is an impracticable standard by which to determine private rights. The law of nationality being unacceptable, one of three rules might have been adopted—the law of the domicile of the deceased, the law of the *situs* of the property, or the internal law of the forum. Considerations of justice and expediency would probably have led to the adoption of the *lex domicilii*. Similarly, it may be shown that all other rules in the conflict of laws rest to a large degree upon considerations of justice, expediency, or policy.

As the individual rules in the conflict of laws of England and the

[17] Bentwich, *The Law of Domicile in its Relation to Succession and the Doctrine of Renvoi* (1911) 184.

[18] *Hilton v. Guyot* (1895) 159 U. S. 113.

United States are not based upon the principle of reciprocity, it follows that these rules should, in the absence of clear reasons to the contrary, apply independently of the existence of like rules in the foreign system some provision of which is, in a given case, incorporated by reference. The theory of *renvoi* proper in its narrower sense, leading as it does to the application of the internal law of the forum in all cases where the rules of the conflict of laws of the forum differ from those of the foreign law which is incorporated by reference, has no basis unless it be a desire to apply, wherever possible, the law of the forum. It is nothing else than a return *pro tanto* to the doctrine of the exclusive prevalence of the internal law of the forum.

According to the theory of *renvoi* proper in its wider form, that is, inclusive of *Weiterverweisung,* the *lex fori* hands over the question to the legal system of the foreign country whose law is incorporated. The judge of the forum is to decide the case, therefore, as the courts of the foreign country would decide it. The English and American cases, so far as they sanction *renvoi,* have expressed it in this form. Their attitude appears clearly from the opinion of Sir Herbert Jenner in *Collier v. Rivaz,* where the learned justice, speaking of Belgian law, said: *"The court sitting here . . . decides as it would if sitting in Belgium."*[19] It must be noted, however, that the statement made by Sir Herbert Jenner is not to be taken literally. The English court does not *actually* decide the case as the Belgian court would. An illustration will make this plain. Suppose that an English judge is called upon to distribute the personal estate of an Englishman whose domicile at the time of his death was in Belgium. The English law would direct the judge to apply the *lex domicilii,* that is, the law of Belgium. If Sir Herbert Jenner's statement is to be taken in its literal meaning, the English judge would be compelled to ascertain how the Belgian judge would decide the case. Upon investigating the law of Belgium he would find that it would distribute the property in accordance with the principle of nationality, that is, in accordance with English law. He would also discover that the courts of Belgium have followed the *renvoi* theory consistently since 1881,[20] and that in consequence the distribution would actually be made by them in accordance with the Belgian statute of distributions. The English judge should consequently apply the same statute of distributions. Although the English judge purports to sit in Belgium, he would, as a matter of fact, apply the *English* statute of distributions. He would not decide the case as the Belgian judge is obliged to do

[19] (1841) 2 Curt. Eccl. 855, 862-63. The italics are those of the present writer.

[20] *Bigwood v. Bigwood,* App. Brussels, May 14, 1881 (*Belgique Judiciaire* (1881) 758). See also Trib. Civ. Brussels, March 2, 1887 (14 CLUNET, 748); App. Brussels, Dec. 24, 1887 (D. 1889, 2, 97); Trib. Nivelles, Feb. 19, 1879 (*Belgique Judiciaire* (1880) 982); Trib. Civ. Brussels, Dec. 1, 1894 (23 CLUNET, 895); Trib. Civ. Antwerp, March 16, 1895 (23 CLUNET, 655).

under Belgian law, ignoring the existence of the *renvoi* doctrine in the Belgian law. The reason why the *renvoi* doctrine of the foreign state is ignored is very plain. No decision could be reached if both judges should attempt to apply the *renvoi* doctrine actually existing in the foreign system. Each law would refer the judge to the law of the other state. There would thus be an endless series of references from which there is no escape.[21]

Because of this, *renvoi* is understood by each judge as a return reference simply to the *internal* law of his country and not to the whole of its law. It is not so certain, however, that the English courts would ignore a foreign *renvoi* doctrine in the case of a forward reference (*Weiterverweisung*), as distinguished from a return reference (*Rückverweisung*), like that just considered. The *renvoi* doctrine appears to be a mere expedient to which the courts resort in order to justify the application of their own law. Hence, if the foreign law (of the state of X), instead of directing the English judge back to his own law, should refer him to the law of another foreign state (state of Y), it is quite possible that he might state the conflict of laws rules of X (now assumed to be referred to by English law in a *renvoi* sense in accordance with the *actual* law of X), if by so doing he might be enabled to apply his own local law. Suppose, for example, that the law of the state of X has adopted the law of nationality in the distribution of personal property upon death, and that the law of the state of Y makes the distribution in accordance with the law of the *situs;* also that the decedent was a subject of the state of Y but was domiciled at the time of his death in the state of X. The property to be administered being in England, the English judge might say: "The law of the state of X which I am directed to apply, recognizing as it does the doctrine of *renvoi,* is referring me to the law of the state of Y as a whole, inclusive of its rules of the conflict of laws." This mode of reasoning would enable him to apply the statute of distributions of the forum.

The suggestion might be made that Sir Herbert Jenner used merely an inapt expression in characterizing the *renvoi* theory of the English courts, and that Bentwich's explanation given above[22] is a more accurate statement of the process. The two theories are, however, fundamentally different. Bentwich's theory necessarily leads to the application of the law of the forum, while the English courts apparently sanction the *renvoi* doctrine in its wider form, that is, inclusive of *Weiterverweisung.*[23] Such a forward reference can be justified only if the final decision in the case is handed over to the foreign law. Bentwich's theory is opposed to this.

[21] Westlake suggested the mutual waiver of jurisdiction theory for the very purpose of avoiding this endless series of references: Westlake, *Private International Law* (5th ed.) 32-34; *supra,* p. 514.

[22] *Supra,* p. 518.

[23] See *Re Trufort* (1887) 36 Ch. D. 601; *Guernsey v. The Imperial Bank of Canada* (1911, C. C. A.) 188 Fed. 300.

The untenability of the theory of *renvoi* proper in its wider form will appear more clearly if its real meaning be set forth in another manner. What actually happens is this: When the English judge in the above case seeks to ascertain the statute in accordance with which he is to make the distribution, he is told by the English law: "I cannot tell you; go and ask the Belgian law." All the English law will do for him is to point out the country which is to give him the final answer. What is true in this case will happen in all cases in which the English judge is called upon to apply foreign law. *In no case will the English law answer any question directly. It will always delegate the task to another state.*

Should the Belgian courts have accepted the *renvoi* doctrine in the same form as the English courts, the Belgian judge again would get no final answer to his questions from the Belgian law, but would be told to ascertain it from the English law.

It is evident, however, that if the English rules of the conflict of laws do not point out any rule of internal law, but merely point out the country whose law is to decide the case, and if the Belgian rules of the conflict of laws are to be understood in the same sense, no direct answer can be found in either system, whether the question be asked by a national judge or by a foreign judge. There would be an endless chain of references, as we have already seen. As the doctrine is actually worked, there is no rule in the English law which will enable an *English* judge to reach a direct decision, but such a rule is, more or less arbitrarily, *assumed* to be found when a *foreign* judge is called upon to apply English law. The same inconsistency would be true of Belgian law. It would not point out a statute of distributions to the *Belgian* judge, but would be deemed to do so where an *English* judge is called upon to apply Belgian law.

The writer would submit that the rules of the conflict of laws of the forum should be regarded as incorporating by reference only the internal law of the foreign state and not its rules of the conflict of laws. The moment it is granted that the adoption of the rules of the conflict of laws rests upon considerations of justice, expediency, and policy, it follows that each state must exercise its own judgment in the matter and determine the matter *finally*. This it fails to do when it adopts the theory of *renvoi* proper in its wider sense. Many writers have argued that the acceptance of the *renvoi* doctrine amounts to an abdication on the part of one sovereign in favor of another.[24] Bentwich denies this. He says:[25]

"It is said again that the *renvoi* is 'a denial of Private International

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[24] Audinet, s. 1899, 2, 105; Bartin, 30 DARRAS, 295; 1 Gierke, *Deutsches Privatrecht*, 214; Klein, 27 ARCHIV FÜR BÜRGERLICHES RECHT, 273; Labbé, 12 CLUNET, 12; Lainé, 23 CLUNET, 256; 3 DARRAS, 334-335; Laurent, s. 1881, 4, 42; Potu, *La question du renvoi du droit international privé*, 319, 321.

[25] *The Law of Domicile*, 186-187.

Law and of the internal autonomy of states.' By this apparently is meant that where a Court accepts the *renvoi,* it puts into force the principle of a foreign country for settling questions of conflict, and renounces its own principle. Thus in a particular case the English Court might apply the law of the nationality in place of the law of the domicile to the movable succession of a person who died abroad (cf. *Re Trufort* and *Re Johnson*). But to this it may be answered (1) that the *renvoi* is applied by way of exception, and, as already remarked, to secure the practical object for which private international law was designed; and (2) that it is a more serious denial of the autonomy of States to compel the operation of a foreign law upon a matter where it refuses to apply itself, than to apply the municipal law because the foreign law refuses jurisdiction. For example, if a French Court were to apply the English statute of distributions to the intestate succession of an Englishman dying domiciled in France, it would be really misapplying the English law to a case where the English legislator never meant it to operate. Like most of the objections to the *renvoi,* this argument against it is purely academic, based entirely on theoretical premises, and entirely regardless of practical consequences. And even on the ground of the pure theory of sovereignty, it may be pointed out that an English Court has no right to assume sovereignty, and decide what part of the foreign law is to be applied, when the person whose succession is in question is not subjected to it either *ratione personae* or *ratione territorii.*"

In reply to Bentwich it may be said that there are no practical advantages to be derived from the adoption of the *renvoi* doctrine, as will be shown later.[26] The second argument advanced by Bentwich is but a repetition of the arguments advanced by von Bar and Westlake in favor of the mutual disclaimer of jurisdiction theory. Its unsoundness has been pointed out by Professor Buzzati.[27] To say that, when the French court applies the English statute of distributions to the intestate succession of an Englishman dying domiciled in France, it is misapplying the English law to a case where the English legislator never meant it to operate, is to misstate the whole problem. The very equality of states makes it impossible for one state to yield to the wishes of another state in this respect. France, therefore, is perfectly within her rights when she directs her judges to apply English law in the above case. And, contrary to Bentwich's assertion, the English courts are equally within their rights should they apply French law. Whether they do so *ratione personae* or *ratione territorii* or by virtue of any other principle cannot be questioned by anyone as long as no established principles of international law are violated. Unless the action of the legislature of a state or of its courts would amount to a "fundamental" denial of justice to the citizens of another sovereign, each state is free to act as it may deem best.[28]

[26] *Infra,* p. 524 *et seq.*

[27] *Supra,* p. 516.

[28] See, for a full discussion of "fundamental" denial of justice to aliens, Borchard, *Diplomatic Protection of Citizens Abroad* (1915) 13, 178, 196-199, 330-343. See also, Kahn, *Über Inhalt, Natur und Methode des internationalen Privatrechts,* 40 Jhering's *Jahrbücher für die Dogmatik,* 1, 40-41.

III

Should anyone be inclined to brush the foregoing arguments aside as "purely academic,"[29] let us consider the practical consequences to which the *renvoi* theory would lead. The chief object of the science of the conflict of laws being to bring about international uniformity of law, let us see whether the *renvoi* theory would be conducive to such an end.

According to *the mutual waiver of jurisdiction theory,* whenever the rules of the conflict of laws of the forum diverge from those of another state whose law has been incorporated by reference, the ordinary or internal law of the forum prevails. This result follows also from the theory of *renvoi* proper in its narrower form, as presented by Bentwich. Instead of promoting uniformity of decision in the different countries, the above theories will have the very opposite effect. If the *renvoi* doctrine be rejected, there is a possibility, it is true, that one state may distribute the personal estate upon death in accordance with the law of domicile, and another state, in accordance with the law of nationality. Two different statutes may thus become applicable.[30] But if *renvoi* in either of the forms just mentioned be accepted, the property will be distributed in accordance with as many statutes as there are states before whose courts the question may come. Bentwich again takes a contrary view and says:

"The objection, however, is a figment of theory, and is not based on a solid practical difficulty. Even if no rule were established by an international convention for the application of the *Renvoi,* in any particular case the English Court or the French Court would know whether the other had already dealt with the succession. If this were so, it would adopt the principle already applied to the succession, and apply either its own rules of private international law or the doctrine of *renvoi* so as to subject the whole moveable succession to one law. Thus in the case supposed, if the English Court, first seised of the matter, had accepted the *renvoi* and applied English law to the English assets of the deceased, a French Court would naturally apply English law to the French assets according to its own rules."[31]

Instead of being a figment of theory, what has been set forth above represents the actual state of the decisions. Bentwich does not cite a single case in which a court has resorted to *renvoi* in one case and refrained from using it in another solely with a view to bringing about the application of the same ultimate rule of decision. The writer is convinced that no such cases can be found in any country.

One or two examples will show the extraordinary results to which,

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[29] *The Law of Domicile,* 186.

[30] There is a possibility that the law of a third state might become applicable; for example, if property should be left in a state which has adopted the law of the *situs* for the distribution of personal property upon death.

[31] *The Law of Domicile,* 183.

under the above theory, the substitution of the law of the forum for the foreign law may lead. Let us assume, in the first place, that an Englishman who is domiciled in Italy makes a contract in Italy, and that suit is brought in the United States for breach of the contract, the defense being lack of capacity. Let us assume also that England applies the law of domicile,[82] Italy the law of nationality, and the United States the law of the place where the contract is made as the rule governing capacity to contract. According to Westlake's theory the law of the forum, that is, American law, would govern the question, although its only connection with the case is the fact that suit is brought there.

Assume, in the next place, that according to the law of a given forum (state of X), the law of the *situs* (state of Y) would govern the validity of a testamentary trust, but that under the law of the *situs* the national law of the testator (state of Z) controls. The internal law of the state of X would determine the validity of the trust; and that solely because suit is brought there and because the law of the state of Y, which the law of the state of X incorporates, has a different rule in the conflict of laws.

There is no escape from consequences such as the above under the mutual disclaimer of jurisdiction theory as it has been developed by Westlake; and these prove the impossibility of accepting the *renvoi* theory in this form. *To the extent that this theory is applied, it means a return to the exclusive application of the ordinary or internal law of the forum, and a sacrifice of all that has been gained during the last century in the development of the rules of the conflict of laws.*

What has been said of the practical consequences to which the mutual disclaimer of jurisdiction theory leads is true also of *the theory of renvoi proper in its narrower sense.* According to the latter theory, whenever the foreign law declines to accept the jurisdiction which is offered to it by the law of the forum, the latter will control. As has been stated, there is nothing in the suggestion made by Bentwich that the *renvoi* theory may be invoked by the court for the purpose of bringing about uniformity of decision. No court, legislator, or writer other than Bentwich, so far as the present writer is aware, has ever suggested that a judge should apply, now the internal law of a foreign country, now its law as a whole, with a view of harmonizing his decision with the decision that has already been rendered in the case by a foreign court.

The doctrine of renvoi proper in its wider sense includes, as we have seen, the possibility of a forward reference (*Weiterverweisung*), and

[82] Whether the English law would apply the *lex domicilii* as regards ordinary business contracts is doubtful. As to such contracts the law of the place where the contract was made may control. See *Male v. Roberts* (1800) 3 Esp. 163; Dicey, *Conflict of Laws* (2d ed.) Rule 149, exception 1, p. 538; Cheng, *Rules of Private International Law Determining Capacity to Contract*, 70-72.

may thus lead to the application of the internal law of a third state. In so far as the application of the theory of *renvoi* proper in its wider form leads to a return reference (*Rückverweisung*), that is, to the *lex fori,* it has exactly the same disadvantages as the other theories. Instead of bringing about international uniformity of decision, it will cause the greatest disharmony possible by subjecting the determination of each case to the internal law of the forum. The English judge in the case above put[33] would distribute the personal property in accordance with the English statute of distributions, while the Belgian judge would apply the Belgian statute of distributions. If the case should arise in New York, the judge would apply the New York statute of distributions.

In so far as the application of the theory of *renvoi* proper in its wider form leads to a forward reference (*Weiterverweisung*), it constitutes no gain whatever. Suppose that two Englishmen who are domiciled in the state of New York enter into a contract in Italy. Suit for breach of the contract is brought in New York, and the defense is lack of capacity. Which law should govern? If *renvoi* is rejected, the New York judge would apply the *lex loci contractus,* that is, the ordinary Italian law relating to capacity. England would apply New York law as the *lex domicilii* of the parties, and Italy would apply the English law as the *lex patriae* of the parties. If, on the other hand, these countries recognize *renvoi* proper in the wider sense (inclusive of *Weiterverweisung*), the New York courts would apply the whole of Italian law (*lex loci contractus*) and, being directed by the Italian rule of the conflict of laws to apply the *lex patriae,* would decide the question in accordance with the English law relating to capacity. The English judge would apply the New York law (*lex domicilii*) inclusive of its conflict of laws, and, being directed by the law of New York to apply the *lex loci contractus,* would determine the case in accordance with the Italian law relating to capacity. The Italian judge would apply the whole of the English law (*lex patriae*), and, being directed by the English judge to apply the *lex domicilii* would hold that the law of New York relating to capacity would control the case.

It is apparent, therefore, that the theory of *renvoi* proper in its wider form leads to no greater uniformity than is attained by rejecting the doctrine. We have seen, moreover,[34] that the doctrine of *Weiterverweisung* might be worked by the courts so as to lead to the application of the local law of the forum.[35]

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[33] *Supra,* pp. 518, 520.

[34] *Supra,* p. 521.

[35] The New York judge might reason that the Italian rule of the conflict of laws was to be understood as referring him to the *lex patriae,* that is, English law, inclusive of its rules of the conflict of laws, and that he must decide the case in accordance with the law of domicile, that is, New York law. The

Whatever form the *renvoi* doctrine may take, once it is recognized it is difficult if not impossible to limit its operation. In every case where the law of the forum incorporates the law of a foreign country, whether it be the law of the domicile, the law of the *situs* of the property, the law of the place where the marriage or contract was entered into, the law of the place where the contract was to be performed, the law of the place where the tort was committed or the law where the marriage was dissolved, or the law where the adoption proceedings, or acts upon which legitimation is based, took place, or any other law, the point might be urged that the law of the country referred to had a different rule on the subject. In the case where the law of the domicile and the law of nationality come into collision, it may be easy enough to ascertain the fact that the foreign country has accepted the principle of nationality; but the task of finding and understanding in all other cases the foreign rule of the conflict of laws covering the case in question is indeed Herculean in its nature.[36]

A court may be inclined to accept the *renvoi* doctrine readily in cases where it leads to the application of its own law, but once it is accepted it must, if logically consistent, be applied under the theory of *renvoi* proper in its wider form—the theory of the English courts—

English judge might say that the rules of the conflict of laws of New York referred to the *lex loci contractus,* that is, Italian law, inclusive of its rules of the conflict of laws, and that he should determine the case, therefore, in accordance with the law of nationality, that is, English law. The Italian judge in the same way might say that the English rule of the conflict of laws referred him to the *lex domicilii,* that is, New York law, inclusive of its rules of the conflict of laws, and that he must decide the case in accordance with the *lex loci contractus,* that is, Italian law.

[36] If it be recalled how uncertain the law is in most states in this country as regards the rule governing the validity and obligation of contracts, it will be easy to realize what the state of the law must be with respect to the conflict of laws in countries not belonging to the Anglo-American group, in which the doctrine of *stare decisis* is unknown.

Even though the foreign rule is perfectly clear and definite it is frequently misunderstood. The case of *Lando v. Lando* (*supra,* n. 3) furnishes a striking illustration. The parties stipulated that the German law applicable to the case was as follows:

"Art. 13. The contraction of a marriage (otherwise translated 'entering into'), even if only one of the parties is a German, is determined in respect of each of the parties by the laws of the country of which he (or she) is a subject (otherwise translated 'to which each respectively belongs'). The same rule applies to an alien who concludes a marriage within the empire. . . .

"The form of a marriage which is concluded within the empire is determined exclusively by German law."

The last paragraph quoted clearly indicates that no marriage celebrated in Germany will be regarded as valid unless it is entered into in the form prescribed by the German law relating to marriage. See Planck, *Bürgerliches Gesetzbuch* (3d ed.) 50. The Supreme Court of Minnesota finds, however, that "the proper interpretation of the provision abounds in doubt and uncertainty," and thus feels justified in upholding the marriage by invoking the rule of interpretation, *semper presumitur pro matrimonia.*

whether it sends the judge back to the law of his own country or sends him forward to the law of a foreign state. Whether he is led in the one direction or in the other, he must inquire into the foreign system of conflict of laws; and, after he has done this, which in a large proportion of cases involves a task far greater than that of applying the internal law of a foreign country, he may still be compelled to apply the internal law of a foreign state. This fact alone should be sufficient to deter the courts from adopting the *renvoi* doctrine in the above form.

So far as the effect of the doctrine of *renvoi* proper in its wider form upon the subject of the conflict of laws is concerned, it must be definitely understood that it will render the whole subject, which in its very nature is full of uncertainty, still more uncertain. The difficulty is not confined to the judge. The lawyer will have much greater difficulty in advising his clients as to their rights. Before he can do so, he must investigate three things: First, the rule of the conflict of laws of his country governing the case; second, the foreign rule of conflict of laws which is incorporated; and third, in many cases, the provisions of the internal or ordinary law of some foreign country. Take the simplest case of a trust in foreign real estate. The moment *renvoi* proper in its wider form is recognized, the primary question would no longer be whether the law of trusts of the *situs* of the property should recognize the validity of such trust, but what the rules of the conflict of laws of the *situs* are; and the latter may refer the judge to the law of another country, for example, to the national law of the owner.[87] In other words, in all cases the rights of the parties will depend not alone upon the rules of the conflict of laws of the forum, but also upon those of the foreign country whose law is incorporated by the law of the forum. A greater state of uncertainty in the law than that which arises from the theory of *renvoi* proper in its wider form is difficult to conceive. The general recognition of the *renvoi* doctrine in either of the forms outlined above would be fatal to the harmonious development of the rules of the conflict of laws in the future. No proper system of the conflict of laws can be built up among the civilized nations as long as this doctrine remains. It cannot be built up on the mutual waiver of jurisdiction theory, nor upon the theory of *renvoi* proper in its narrower form, because they imply a reversion *pro tanto* to the exclusive application of the local or internal law of the forum, a seizing of every opportunity on the part of the courts to apply their own law. It cannot be built up on the theory of *renvoi* proper in its wider form, because the latter implies a shirking of all direct responsibility on the part of each state. According to the latter theory, a state is not bound to give a final answer to any question in the conflict

[87] See the unreported case of *Re Baines*, decided March 19, 1903, by Farwell, J., given in Dicey, *Conflict of Laws* (2d ed.) 723.

of laws, but is regarded as having performed its full duty by handing a power of attorney for that purpose to another state. It is only when each state, through its legislature or courts, conceives itself obliged to assume direct responsibility in the matter, and learns to discharge its duty with a view to promoting international justice rather than petty and selfish ends of its own, that a proper basis will be created for any real progress in the science of the conflict of laws. The *renvoi* doctrine, however, in whatever form it be adopted, tends in just the opposite direction. Whatever strength this doctrine may gain temporarily because of the equivocal meaning of the term "law of a country" and the natural predisposition on the part of judges to apply their own law, there can be no doubt of its ultimate overthrow. Its days ought to be few after its deceptive character is fully understood.

IV

The conclusion having been fully established that the *renvoi* doctrine cannot be accepted as a general principle in the conflict of laws, we may briefly consider certain exceptional cases in which a recognition that the *lex fori* should incorporate the foreign law inclusive of its rules of the conflict of laws may be either necessary or expedient.

(1) It has been found necessary to accept the *renvoi* doctrine in the framing of international conventions as the only means of bringing together nations with different rules in the conflict of laws.[38]

(2) Von Bar has called attention to a certain class of cases in which on grounds of justice it is necessary, it would seem, to recognize *renvoi* or something akin to it. He gives the following examples:[39]

"Two subjects of the State of X are married in the State of Y, where they are domiciled. The validity of the marriage is questioned in the State of Z on the ground that the parties had no capacity to enter into the marriage under the provisions of the laws of the State of Y relating to marriage, though it is conceded that they possessed such capacity under the national law with respect to marriage. The laws of the States of X and Y agree that the *lex patriae* shall govern the essentials of a marriage. The law of the State of Z, on the other hand, applies the *lex loci celebrationis*. Should the courts of the State of Z regard the marriage as valid?

"A, a citizen of the State of X, dies domiciled in the State of Y. The laws of the States of X and Y agree that B is entitled to A's personal estate in accordance with A's national law. Subsequently B's heirship is contested in the State of Z, in which State the *lex domicilii* is held to govern the distribution of personal property upon death. Should B's title be recognized by the courts of the State of Z?"

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[38] See Art. 1 on The Hague Convention of June 12, 1902, relating to marriage, and Art. 74 of the Uniform Law of The Hague Convention of 1912, relating to bills of exchange.

[39] 8 NIEMEYER, 183-184.

Von Bar would answer both questions in the affirmative. He submitted the following rule, intended to cover the above class of cases, to the Institute of International Law:

"Provided that no express provision to the contrary exists, the court shall respect . . . .

"(b) The decision of two or more foreign systems of law, provided it be certain that one of them is necessarily competent, which agree in attributing the determination of a question to the same system of law.[40]

A motion embodying the above proposition was submitted to the Institute of International Law, but its consideration was postponed because the motion was deemed to embody something quite distinct from the *renvoi* doctrine in general.[41]

The rule in the form above stated actually accepts the doctrine of *renvoi* proper, provided (1) that the foreign countries with which the transactions may be connected have the same rule in the conflict of laws; (2) that the law of one of them be applicable under the law of the forum. Thus limited, the *renvoi* doctrine not only leads to results which are obviously just, but also tends to promote international uniformity in the decisions. The statement in *Guernsey v. The Imperial Bank of Canada* quoted above,[42] may be supported on this ground.

(3) Because of the favor shown to marriages, the *lex loci celebrationis* might be deemed to incorporate the foreign law as a whole *for the purpose of sustaining a marriage,* as in the case of *Lando v. Lando,*[43] but not to defeat it. It would be preferable, however, if this result were reached through the adoption of an alternative rule in the conflict of laws. If, for example, the law of Minnesota, instead of saying that the marriage *must* satisfy the *lex loci celebrationis,* had said that a marriage should be upheld if it satisfied either the law of the place where it was entered into or the law of the domicile of the parties, it would not have been necessary in *Lando v. Lando* to resort to the *renvoi* doctrine in order to render the marriage valid.

(4) It would seem that, by reason of the permanent and exclusive physical control which a nation has over immovable property within its territory, the validity of a conveyance of such property should be determined in accordance with the law of the *situs* as a whole. It would follow that if the law of the *situs* authorized the execution of a deed or will in the form prescribed by the law of the place of execution, its validity should be recognized everywhere. Similarly, if the law of the *situs* should determine the capacity of a party to dispose of such property by deed or will in accordance with the national law of

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[40] 18 ANNUAIRE, 41.
[41] 18 ANNUAIRE, 186-187.
[42] *Supra,* n. 2.
[43] *Supra,* n. 3.

its owner, the courts of all countries should apply this rule. This might lead to a return reference to the law of the forum or to a forward reference to the law of another country. It might involve even a second reference, for example, if the national law of the owner of the property should determine the question of majority in accordance with the law of domicile.

The question may be asked: Does the recognition of the *renvoi* doctrine as regards conveyances of immovable property not lead to the same insuperable difficulties pointed out in the general discussion? How can these cases be taken out of the general rule without destroying the rule itself? The writer is of the opinion that because of the permanent and exclusive physical control which a state has over all immovable property within its territory, which it does not possess with reference to movable property or with respect to persons, such an exception might be justified. By reason of such control the courts of most countries would probably be willing to look *primarily* to the law of the *situs* of the immovable property and to decide the questions *actually* as the courts of the *situs* would. In other words, it would seem that in the conveyance of immovable property there is a reasonable basis for the expectation that the adoption of the *renvoi* doctrine would promote international uniformity of decision.

Uniformity might be reached without recourse to the *renvoi* doctrine if all countries would adopt alternative rules in their systems of the conflict of laws. As regards the formal execution of a deed or will, the general acceptance of the rule *locus regit actum* as an alternative rule would be sufficient. With respect to capacity and the substantive validity of wills and deeds, international uniformity could be brought about only in case all countries were willing to sustain such instruments if they satisfied either the law of the *situs* or the national law of the owner.[44] Under present conditions, the *renvoi* doctrine would appear to be the only practicable means by which such uniformity can be attained.

APPENDIX

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